



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

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May 30, 2013

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Sent by e-mail to: Jeff.Civins@haynesboone.com

PREPARED FOR SETTLEMENT PURPOSES

**RE: CLEAN HARBORS EL DORADO, LLC
HAZARDOUS WASTE MANAGEMENT FACILITY, EL DORADO, ARKANSAS,
EPA ID NO. ARD069748192**

Dear Jeff:

I am writing on behalf of U.S. EPA Region 6 ("EPA") regarding the Clean Harbors—El Dorado, LLC facility referenced above (the "Facility"). In response to EPA's May 10, 2013 letter providing a proposed draft CAFO and penalty calculation, you have asked for additional information concerning EPA's calculation of the proposed settlement penalty for purposes of preparing for a settlement negotiation in the near future. As described below, EPA calculated the proposed settlement penalty consistent with the RCRA Penalty Policy.

Count 1

The proposed penalty for Count 1, concerning failure to make a hazardous waste determination of the saturator brine, includes a gravity component and an economic benefit component. The failure to make a hazardous waste determination led to Clean Harbors' operation of the Brine Unit and its sale of the treated brine for use in drilling fluid. For settlement purposes, EPA is seeking an economic benefit for all of the brine-related issues under Count 1 rather than the other brine related counts (Counts 2-4). The amount of economic benefit is \$3,038,499. This is an estimate of avoided cost to dispose of the saturator brine as a hazardous waste for three years. EPA used an estimated annual disposal cost based on the cost Clean Harbors reported for saturator brine disposal from February 13, 2012 through the end of 2012.¹ Please note that the economic benefit reasonably could be a larger amount. For instance, EPA is reaching back only three years even though Clean Harbors has avoided these disposal costs for a much longer period. Also, the annual disposal cost input is based on less than a full year of saturator brine disposal.² EPA could extrapolate the estimated annual disposal cost in order to reflect a full year of saturator brine disposal. Not only did Clean Harbors avoid these disposal

¹ Clean Harbors provided this information in its January 30, 2013 response to EPA's information request.

² It is based on the reported cost for disposal from February 13, 2012 through the end of 2012.

costs, it also generated revenue through the sale of the brine for use in drilling fluid. The economic benefit could include this revenue, which Clean Harbors reported for the years 2009 through 2011.³ And, through its operation of the Brine Unit, Clean Harbors has reduced the volume of the saturator brine substantially for years. Approximately 43% of the saturator brine is evaporated and 26% is returned to the saturator after treatment in the brine unit.⁴ The economic benefit could take account of the avoided cost of disposal of these portions of the saturator brine, which, but for the failure to make a hazardous waste determination and the operation of the brine unit, would be disposed of as hazardous waste.

The gravity component of the proposed settlement penalty for Count 1 is \$1,553,075. In this matter, Clean Harbors' failure to determine that the saturator brine is a hazardous waste led to operation of the Brine Unit and to the sale of the treated brine for a use that constitutes disposal. The hazardous waste determination is a threshold step in managing wastes in compliance with RCRA, and stemming from of this violation was Clean Harbors' failure to comply with a substantial portion of applicable hazardous waste management requirements. EPA considers this violation as a major deviation from compliance with the RCRA regulatory scheme. Use of the saturator brine in drilling fluid results in loss of a substantial portion of the saturator brine to the subsurface environment. Clean Harbors does not control the disposition or recovery of the saturator brine when it is used in drilling fluid. There is a substantial risk that environmental receptors, including groundwater, may be exposed to saturator brine lost to the environment when used in drilling fluid. The saturator brine contains toxic metals including lead and cadmium, among others, and potentially other hazardous constituents. Clean Harbors has not established that these constituents are present in similar concentrations in commercial calcium chloride brines from non-waste sources or that they contribute to the function of the saturator brine in drilling fluid. In addition, failing to determine that the saturator brine is a hazardous waste led Clean Harbors to manage the saturator brine outside of RCRA's requirements. This violation undermined a primary purpose of 40 CFR Part 262 to establish standards for generators of hazardous waste, including the requirement to determine whether a waste is hazardous and to identify the applicable regulatory requirements for managing the waste. EPA therefore considers this violation as posing a major potential for harm.

To calculate the settlement penalty for Count 1, EPA used a multi-day calculation over a one-year (365 day) period, assessing \$4,255.00 per day, which is the mid-range of the major-major category of violations under the RCRA Penalty Policy. For a major-major violation, the RCRA Penalty Policy requires EPA to assess a multi-day penalty of at least 180 days when the violation has been ongoing for 180 days or more. Assessing a multi-day penalty for more than 180 days for this count is appropriate because the violation is documented as ongoing for many years and likely caused substantial unaccounted for and uncontrolled losses of the saturator brine

³ Clean Harbors provided this information in its January 30, 2013 response to EPA's information request.

⁴ Clean Harbors provided this information in its January 30, 2013 response to EPA's information request.

to the environment. EPA could assess the penalty for this count over a longer period, but for settlement purposes EPA has limited the multi-day period to one year.

Count 3

The proposed penalty for Count 3, concerning failure to meet RCRA tank standards in the Brine Unit, is \$765,900. The Brine Unit operations use tanks subject to standards in 40 CFR Part 264 Subpart J. Clean Harbors has not permitted the Brine Unit as a hazardous waste management (treatment) unit and has not met the applicable tank standard to operate the unit. EPA considers the failure to meet the tank standards in the Brine Unit a major deviation from the regulatory scheme, as Clean Harbors has failed to comply with all or a substantial portion of the applicable requirements. EPA inspectors observed corrosion of metal surfaces in the unit, apparently from the saturator brine, and tanks in this unit without secondary containment. EPA considers this violation to pose a substantial risk of exposure of workers in the Brine Unit to the saturator brine or of exposure of environmental receptors to the saturator brine. Failure to comply with applicable Subpart J standards for tanks in this unit undermines the purpose of Part 264 to establish minimum national standards defining the acceptable management of hazardous waste. EPA therefore considers this violation as posing a major potential for harm.

To calculate the settlement penalty for Count 3, EPA used a multi-day calculation over a 180-day period, assessing \$4,255.00 per day, which is the mid-range of the major-major category of violations under the RCRA Penalty Policy. Assessment of a multi-day penalty is appropriate in this situation because the violation is documented and has been ongoing for many years. For a major-major violation, the RCRA Penalty Policy requires EPA to assess a multi-day penalty of at least 180 days when the violation has been ongoing for 180 days or more. EPA could assess the penalty for this count over a longer period, but for settlement purposes EPA has limited the multi-day period to 180 days.

Count 5

The proposed penalty for Count 5, concerning failure to comply with 40 CFR Part 264 Subpart CC for permitted hazardous waste tanks, is \$1,553,075. Clean Harbors failed to monitor its carbon canisters at the frequency required by Subpart CC. It also failed to replace spent carbon in its canisters for extended periods, when the regulation requires immediate carbon replacement. Clean Harbors chose to use this method of CC compliance in its RCRA permit applications, but for years it has failed to meet the main requirements for carbon canister monitoring and maintenance. EPA considers the failure to comply with CC requirements as a major deviation from the RCRA regulatory scheme. CC compliance is necessary to control emissions of volatile compounds to the air. Failing to adequately monitor and maintain carbon canisters on its permitted tanks over several years created a substantial risk of emissions from hazardous waste tanks to the ambient air and of exposure of workers to the hazardous waste

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emissions. Additionally, the failure to monitor and maintain these canisters undermines the purpose of Part 264 to establish minimum national standards defining the acceptable management of hazardous waste. It undermines the purpose of Subpart CC to establish standards to control emissions from hazardous waste management tanks. EPA therefore considers this violation to pose a major potential for harm.

To calculate the settlement penalty for Count 3, EPA used a multi-day calculation over a 365-day period, assessing \$4,255.00 per day, which is the mid-range of the major-major category of violations under the RCRA Penalty Policy. For a major-major violation, the RCRA Penalty Policy requires EPA to assess a multi-day penalty of at least 180 days when the violation has been ongoing for 180 days or more. Assessment of a multi-day penalty for more than 180 days for this count is appropriate because the violation is documented as ongoing for many years and likely caused unaccounted for and uncontrolled emissions to the environment over that time period. EPA could assess the penalty for this count over a longer period, but for settlement purposes EPA has limited the multi-day period to one year.

Adjustments Under the RCRA Penalty Policy

EPA recognizes that the RCRA Penalty Policy provides for downward adjustments to the gravity component of a calculated penalty for factors including a company's good faith effort to comply with RCRA. EPA has not included a downward adjustment to the settlement penalty for good faith efforts at this time, but we welcome Clean Harbors' input on this component, as you have indicated that Clean Harbors believes an adjustment would be warranted in this case. Please note that the policy does not require a downward adjustment for good faith based on efforts to return to compliance after a violation has been identified by EPA.

In addition, for purposes of calculating this settlement penalty, EPA has not assessed a penalty for Count 2, with respect to the failure to obtain RCRA permit authorization for treatment in the Brine Unit or for Count 4, with respect to Land Disposal Restrictions under 40 CFR Part 268. Nothing in this letter or the draft CAFO or proposed settlement penalty would limit the counts EPA may choose to allege or the relief EPA may seek in a complaint or hearing context if this matter is not settled by negotiation. We hope that you find this information helpful in assessing the proposed settlement and preparing for an upcoming settlement meeting. As we have discussed, Evan Pearson will be the lead attorney for EPA on this matter going forward.

Sincerely,



Jon Bull

Office of Regional Counsel

U.S. Environmental Protection Agency, Region 6

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CC:

Guy Tidmore, U.S. Environmental Protection Agency, Region 6
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